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THE FTC AT 100: VIEWS FROM THE ACADEMIC EXPERTS

FRIDAY, FEBRUARY 28, 2014

House of Representatives,

Subcommittee on Commerce, Manufacturing, and Trade

Committee on Energy and Commerce

Washington, D.C.

The Subcommittee met, pursuant to call, at 9:34 a.m., in Room 2123 of the Rayburn House Office Building, Hon. Lee Terry [Chairman of the Subcommittee] presiding.

Members present: Representatives Terry, Lance, Blackburn, Harper, Guthrie, Kinzinger, Bilirakis, Johnson, Long, Schakowsky, McNerney, Barrow, and Waxman (ex officio).

Staff present: Charlotte Baker, Press Secretary; Kirby Howard, Legislative Clerk; Nick Magallanes, Policy

Coordinator, CMT; Brian McCullough, Senior Professional Staff Member, CMT; Gib Mullan, Chief Counsel, CMT; Shannon Weinberg Taylor, Counsel, CMT; Michelle Ash, Democratic Chief Counsel; and William Wallace, Democratic Professional Staff Member.

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Mr. {Terry.} Good morning, everybody, and thank you for being here to our second installment on our review of the FTC at 100. Today's theme is basically outsiders looking in as opposed to the insiders looking out, which was our first hearing. But before we get into the details, I want to thank Gib Mullan for his years of service on our subcommittee. He is going back to his roots, going back to the Consumer Protection Council or Commission--Consumer Protection Safety Commission and he will be counsel over there. So Gib, I just really appreciate the great work you have done for this subcommittee in the last 3 years, two different chairmen with two different personalities, and you've managed both well, so thank you for your service. Yes, this is his last day, then he goes and gets a real job. And--starting the clock. Well, so good morning, and the FTC at 100 years. This was an agency that was built, established in 1914 when there was a great deal of consternation in our country about some of the larger businesses that seemed to have--well, not seemed, were monopolies, and abuses to consumers ensued when there was total control over a certain market by one business; whether

it was Standard Oil or American Tobacco. And that was the reason for the FTC's commission. And today we are looking at whether those missions of 1914 are still relevant today, and I think most consumers, citizens, and people on this committee say, yes, those are relevant, but is the FTC doing what they need to do. And it is a different society in 2014, and today we are an economy not of big manufacturers that become the monopolies, but a country of innovators in technology, and data, and privacy, and so many other issues that frankly weren't part of the culture or infrastructure on which the FTC was built.

So are their standards appropriate? Are there tests to determine if there is consumer harm appropriate? Are they even at a hearing from your opinions to those long-standing tests of harm? How do they quantify this today? And frankly I think there is another outside competing and adding to the layer of complexity in how they do their job with the consumer finance committee that's been put in, and the reality is, is that those two committees now share jurisdiction, but you have the CFPB that virtually has no tests and no standards, and in reality it looked like the FTC

is trying to compete to make sure that they have equal status in the sense that they don't have any standards or tests. I want to see if that is your collective interpretation of how the FTC is working in the modern world.

[The prepared statement of Mr. Terry follows:]

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Mr. {Terry.} So at this point, Marsha, do you have an opening statement?

Mrs. {Blackburn.} Yes, I do.

Mr. {Terry.} And I yield to the gentlelady from Tennessee.

Mrs. {Blackburn.} And first, I want to thank Gib Mullan for all of his service to our committee. The past two Congresses Gib has really worked tirelessly with us on a host of issues for consumer product safety and working with me on everything from the Reform Act to buckyballs to a host of manufacturing issues. And so, Gib, we are really going to miss you. We appreciate the leadership that you have brought to the committee and the due diligence that you have done on behalf of the committee and of our constituents, so we thank you for that.

The FTC is turning 100 in less than a year, and we are pleased to have all of you with us and to look at their role and to see how they are enforcing their core mission. A few of the questions that I am going to touch on today, how can Congress and the FTC work better to maximize consumer

welfare? Are there regulatory jurisdictions that overlap between the FTC and other agencies? And how do we address these duplications and redundancies? How can we best harmonize regulations so that the industry does not have duplicative costs? And what should the balance be between regulation and enforcement?

So, Mr. Chairman, I thank you for the hearing, and I yield the balance of my time.

[The prepared statement Mrs. Blackburn follows:]

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Mr. {Terry.} Well, I thank you, and now recognize the ranking member of committee from the great state of Illinois.

Ms. {Schakowsky.} Thank you, Mr. Chairman. You know, in thanking and congratulating Gib Mullan, I want to say that I think too often we don't thank the staff for the incredible work that they do. Most people around here do understand the absolutely critical role, the essential role that our secretaries--and Gib has really shown his professionalism and I think has contributed to what has been remarkably bipartisan nature of this committee. So, Gib, I really want to wish you well as you go to the Consumer Product Safety Commission, and hope to see you in that capacity as well. Thank you.

So to the hearing, this is our second in our series on the Federal Trade Commission's first 100 years and the future of the agency. So I am very eager to hear from our witnesses about your perspective on the FTC at 100 and where the commission ought to be going.

The FTC is an important cop on the beat, protecting both public and business against unfair, deceptive, fraudulent or

anti-competitive practices through its consumer protection and anti-trust authorities.

I began my career in public service as a consumer advocate fighting successfully to get expiration dates posted on food packaging. And I view the FTC through the lens of how effective it is in making sure consumers are respected, well-informed, and fairly treated.

The FTC has been effective in many areas of consumer protection. For example, last year, it successfully strengthened the Children's Online Privacy Protection Act to reflect the rapidly changing nature of what is considered personal information. And it also defended consumers from companies that failed to reasonably protect consumer data such as the web connected camera company TransNet, whose poor security allowed hackers to spy on consumers and their kids in their homes.

As commerce continues to change, as the Chairman so clearly talked about, and expand, the FTC has had to adapt to a new economy. As our social network shopping, banking, and other forms of communication and business move to the Internet, the FTC has changed, bringing more technology

experts on board.

At the same time, its resources are as tight as ever. In our December hearing with the commissioners, they pointed to ``resource constraints'' and the need to leverage those resources through ``careful case selection.'' I am concerned that we are asking one of the country's most important consumer agencies to choose which criminals it will pursue or on which crimes it will enforce the law. I hope we will work together to ensure that the FTC has the resources it needs to maintain consumer protection and a fair marketplace.

From a regulatory standpoint, I believe it is time to look at ways to reduce barriers to FTC consumer protection rule makings. The FTC's ability to move forward with important rule making is much more limited than those at other agencies. I also believe the FTC should have greater authority to pursue civil penalties in the event of a failure to reasonably protect consumers.

In the rapidly changing climate of commerce today, rule making must be efficient, and penalty enforcement must be meaningful. The growth of the Internet has presented us with new questions about privacy rights and expectations. That is

why Chairman Terry and I decided to form the Privacy Working Group, which is co-chaired by Congresswoman Blackburn and Congressman Welch. The group is tasked with exploring the current privacy landscape and considering possible solutions to the challenges that we find.

As I said at the last FTC hearing, I am particularly interested in the issue of privacy agreements. The FTC has the power to hold companies to the privacy agreements they offer their customers, visitors, and users, and it does hold bad actors accountable. But there is no law requiring baseline privacy protections--there is no law requiring that baseline privacy protections are promised to consumers. And the FTC can't enforce what is not promised.

I look forward to hearing from our witnesses as to whether a minimum online privacy standard would be beneficial. Again I look forward to hearing from our witnesses about what we can do to enable the FTC to continue its progress and increase its effectiveness in the future. I yield back.

[The prepared statement of Ms. Schakowsky follows:]

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Mr. {Terry.} Does anyone else on our side, the Republican side, have a statement? Seeing--well, Billy said no, and the others are ignoring us. So I am going to say no. Do you have--Mr. McNerney? All right, so we are going to go right to our witnesses. This is a distinguished panel of academics who have great experience with the FTC and can provide us that view, the expert view now from the outside looking into the FTC. And we appreciate all. I am going to introduce all of you now, and then we will just go from my left to your right along the panel. Many of you have testified before before us, so you know how it works.

So our first, Mr. Howard Beales, professor of the George Washington University School of Business. Daniel Crane, associate dean for faculty and research at the Frederick Paul Furth, Senior Professor of Law, University of Michigan School of Law. Thank you for being here. Geoffrey Manne, founder and executive director, International Center for Law and Economics. Christopher Yoo, John H. Chestnut Professor of Law, Communication and Computer and Information Science, director Center for Technology, Innovation and Competition,

University of Pennsylvania Law School. I certainly like the Big 10 theme occurring here. Robert Lande, venerable professor of law, University of Baltimore School of Law. Thank you. Paul Ohm, associate professor of University of Colorado Law School, and I will make no comments, sarcastic comments about the University of Colorado.

We do appreciate you being here, and we will start with Mr. Beales. As you know, you have 5 minutes. If you go over 5 minutes, I will kind of start lightly tapping just to remind you to kind of jump to the conclusion. If you get to six minutes, I will start pounding really hard. So with that, Mr. Beales, you are recognized for your 5 minutes. And once again to all of you, thank you for being here.

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^STATEMENTS OF HOWARD BEALES, PROFESSOR, THE GEORGE WASHINGTON UNIVERSITY SCHOOL OF BUSINESS; DANIEL CRANE, ASSOCIATE DEAN FOR FACULTY AND RESEARCH AND THE FREDERICK PAUL FURTH, SR. PROFESSOR OF LAW, UNIVERSITY OF MICHIGAN SCHOOL OF LAW; GEOFFREY MANNE, FOUNDER AND EXECUTIVE DIRECTOR, INTERNATIONAL CENTER FOR LAW AND ECONOMICS; CHRISTOPHER YOO, JOHN H. CHESTNUT PROFESSOR OF LAW, COMMUNICATION, AND COMPUTER AND INFORMATION SCIENCE, AND DIRECTOR, CENTER FOR TECHNOLOGY, INNOVATION AND COMPETITION, UNIVERSITY OF PENNSYLVANIA LAW SCHOOL; ROBERT LANDE, VENABLE PROFESSOR OF LAW, UNIVERSITY OF BALTIMORE SCHOOL OF LAW; AND PAUL OHM, ASSOCIATE PROFESSOR, UNIVERSITY OF COLORADO LAW SCHOOL

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^STATEMENT OF HOWARD BEALES

} Mr. {Beales.} Chairman Terry, Ranking Member Schakowsky, and members of the committee, thank you for the opportunity to testify today. I am Howard Beales, professor of strategic management and public policy at the George

Washington School of Business. In addition to publishing a number of academic articles on the FTC, I have held a variety of positions at the agency, most recently as director of the Bureau of Consumer Protection from 2001 to 2004.

In my testimony today, I will focus on the FTC's consumer protection mission, recognizing that it is closely related to the commission's role in protecting competitive markets because markets organize and drive our economy.

Consumer protection policy can profoundly enhance the economic benefits of competition by strengthening the market or it can reduce these benefits by unduly hampering the competitive process. By and large, the FTC has done an excellent job in its consumer protection mission. Recognizing that generally strong performance, I want to highlight today some areas where it is harming consumer welfare.

First and most importantly, the commission has lost its way in its approach to advertising regulation. Virtually any communication is subject to misinterpretation, and advertising is no exception. However straightforward the message and however careful the execution, some consumers are

likely to misinterpret it. In fact, academic studies of communications find 20 to 30 percent of the audience misunderstand some aspect of whether it is advertising or editorial content.

To address this problem, the 1983 Deception Policy Statement focused on the meaning of an advertisement to the average listener or the general populous or the typical buyer. A footnote acknowledged that an interpretation may be reasonable if it is only shared by a significant minority of consumers. The commission's recent POM opinion, the footnote swallows the standard. The most commission claims is the advertisement convey challenges claims to at least a significant minority of reasonable consumers.

The commission relied entirely on its own reading of the advertising. When balancing the protection of a minority of consumers against the interests of others who would like to learn about emerging science, however, the need for extrinsic evidence is acute. There is no reasonable way to strike the balance without some sense of roughly how many consumers fall into each group.

Moreover, it is essential to determine whether that

significant minority is greater than the 20 or 30 percent who are likely to misunderstand any message. Good survey evidence can address precisely that question. What is needed is a deeper appreciation of the fact that consumers who correctly interpret a message are harmed when the commission prohibits claims that some misunderstand.

The commission's approach to up-to claims is a case in point. Although most reasonable consumers surely understand that saving up to a certain amount is different from saving at least that amount. The FTC issued warning letters asserting that the two claims are exactly the same. And up-to claim is only allowed if all or almost all consumers experience that result. That is a standard that suppresses valuable information.

Second, the commission is requiring excessive amounts of evidence to substantiate advertising claims. The core principle of substantiation has always recognized the uncertainty surrounding many claims and balanced the benefits of truthful claims against the cost of false ones. Consider, for example, the Kellogg's claim about the relationship between diets high in fiber and the risk of cancer. If the

claim is true, waiting for the results of clinical trials would impose substantial costs on consumers who would lose important information about the likely relationship between fiber consumption and cancer risk.

On the other hand, if the claim is false, the consequence of consumers are only giving up a better tasting cereal or paying a little bit more for a higher fiber product. The far more serious mistake is to prohibit truthful claims.

The commission's recent cases reflect a move toward a more rigid standard modeled on the drug approval process, requiring two randomized clinical trials for claims about the relationship between nutrients and disease. This standard is excessive in most cases and likely to deprive consumers of valuable, truthful information.

There are ways of learning about the world other than clinical trials. There are, for example, no randomized trials of parachutes, but few would jump out of an airplane without one. Nor are there randomized trials about the adverse effects of tobacco consumption.

Indeed, much of what we know about the relationship

between diet and disease is based on epidemiology, not randomized trials.

The commission says nothing has changed because the requirement for two clinicals is just fencing in really. However, the reason the commission offers for this second test is universally true. The second test might yield a different result. As former Chairman Potofsky has written, advertising regulations should seek reliable data, not abstract truth. Knowing that precisely one clinical trial supports an important health-related claim is valuable to consumers. The commission should return to its traditional balancing test.

Second, the commission should restrict its privacy enforcement actions to practices that cause real harm. There may be subjective preferences that some consumers have for-- to stop practices that they think of as creepy. And those preferences should be protected when they are expressed in the marketplace. I think it is analogous to kosher where some people have a preference that is very real and should be protected. But the people who have that preference are the people who need to make the choice. It shouldn't be the

commission making the choice for them or requiring all sellers to cater to the preferences of a few consumers when others don't share that preference.

Anchoring privacy enforcement and harm is a way to do that, and I think it is something the commission should retain.

Thank you very much, and I look forward to your questions.

[The prepared statement of Mr. Beales follows:]

********** INSERT 1 **********

Mr. {Terry.} Thank you very much. Mr. Crane, now you are recognized for your 5 minutes.

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^STATEMENT OF DANIEL CRANE

} Mr. {Crane.} Chairman Terry, Ranking Member Schakowsky, and members of the subcommittee, thank you for this opportunity to appear before you today. I am Daniel Crane of the University of Michigan. My comments will concern the FTC's continuing and original mandate to guard against unfair methods of competition.

I wish to make three broad points. First, over the course of its first 100 years, the FTC has not followed the original congressional design, which contemplated that the commission would be an expert, politically independent agency exercising quasi-legislative and quasi-judicial functions.

Second, the FTC has nonetheless emerged as a successful law enforcement agency. Third, the FTC's 100 birthday is an opportune moment to consider options for modernizing the agency in light of its actual functioning.

The FTC was a product of progressive era belief in regulation by technocratic experts. In 1935, in upholding the FTC's independence and the president's removal power, the

Supreme Court articulated the statutory features that justified the commission's independence. The FTC was to be nonpartisan and politically independent from other branches of government. Its responsibilities were not executive but rather quasi-judicial and quasi-legislative. The FTC was to be a uniquely expert body. The original statutory design also contemplated that the commission would collaborate with the Justice Department in enforcing the anti-trust laws, for example, by sitting as a chancellor in equity.

As a historical matter, almost none of this has worked out. Though the commission may be politically independent from the executive branch, social science research shows that it is highly inclined to the will of Congress. This may create a desirable separation of powers, but it does not create the kind of pure political neutrality envisioned during the progressive era. As competition capacity, the commission has not been a rule-making authority almost at all. Indeed a 1989 study by the American Bar Association suggested that it would be inappropriate for the commission to have such a role.

The commission may in theory exercise an adjudicatory

function, but that too is largely illusory. First, the commission more frequently brings anti-trust actions in court than through internal adjudication. Second, when it does adjudicate internally, it is questionable whether there is an impartial adversarial contest.

Between 1983 and 2008, for example, the FTC staff won all 16 cases adjudicated by the commission, leaving the real contest to happen in the court of appeals.

What about expertise? Yes, the FTC has considerable expertise on economics and particular industries, but not greater expertise in the justice department. The FTC is thus expert but not uniquely expert compared to other governmental bodies.

Finally the statutory provisions designed to encourage collaboration between the FTC and Justice Department have been almost entirely neglected. Instead of collaborating on enforcements, the two agencies essentially allocate cases depending on their experience with particular industries or political factors.

In sum, the FTC's action behavior as an institution bears little resemblance to the design that ostensibly

justifies its independence as an agency. This does not mean, however, that the FTC is a failed institution. To the contrary, the FTC today is largely an effective law enforcement agency, an agency that enforces the anti-trust laws on essentially equal terms with the anti-trust division. Although there would be considerable sense in consolidating anti-trust enforcement in a single agency, the political will for such a move is probably lacking.

It is therefore appropriate to focus on more modest reforms that could improve the functioning of the agency in light of what it actually is and does. Let me briefly propose four such reforms.

First, as several commissioners have recently proposed, the FTC should adopt guidelines to limit its powers to prosecute unfair methods of competition that would not be already covered by the Sherman or Clayton Acts. This is important to prevent the FTC from having excessive discretion to make up competition rules on the fly while serving an essentially prosecutorial function.

Second, under existing case law, the FTC can obtain a preliminary injunction against mergers in order to pursue

administrative action on a lower standard of proof than a substantial likelihood of success on a merits criterion applicable to the Justice Department. Given that both agencies exercise essentially the same law enforcement function, there is no reason for the FTC to enjoy an advantage that the Justice Department does not.

Third, the two agencies should be encouraged to enter into a formal public agreement allocating anti-trust enforcement authority, which would enhance clarity and transparency in case allocation. The agencies entered into such an agreement in 2002 but then rescinded it under pressure from Congress.

Fourth and finally, under the unique appellate review statute in place since 1914, a large corporate defendant may appeal a commission order to essentially any of the 12 appellate circuits that it chooses. This creates a serious disadvantage for the FTC insofar as defendants routinely pick the court of appeals with the most favorable law on the relevant issue which the Supreme Court rarely reviews. The statute could be amended to reduce this appellate forum shopping. Thank you very much. I look forward to your

questions.

[The prepared statement of Mr. Crane follows:]

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Mr. {Terry.} Well timed. Mr. Manne, you are now recognized for your 5 minutes.

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^STATEMENT OF GEOFFREY MANNE

} Mr. {Manne.} Thank you, Chairman Terry, Ranking Member Schakowsky, and members of the committee. Thanks for the opportunity to testify today. The FTC does much very well. Compared to other regulatory agencies, it is frankly a paragon of restraint and economic analysis. And this has long been true especially of its anti-trust enforcement disciplined by the courts and internal practice.

Not so much so for the commission's ambiguous and somewhat cavalier use of Section Five. The FTC's essential dilemma is clear. Very often, the challenged practice could either harm or help consumers or both. Everyone agrees that wrongly deterring the helpful can be just as bad as failing to deter the harmful. Indeed, sometimes it may be much worse.

So principled restraint is key to ensuring the FTC actually protects consumers. Restraint requires two things; objective economic analysis and transparent decisions reviewable by the courts. Both are increasingly lacking at

the FTC. Consider the recent Nielsen-Arbitron merger. The FTC imposed structural conditions claiming the merger would lessen competition in the market for national syndicated cross-platform audience measurement services. You will be forgiven for not knowing that market existed because it doesn't exist. The majority presumed to predict the future business models and technologies of these companies. They assumed the merger would also reduce competition in this hypothetical future market. That is an economic question.

As Commissioner Wright noted in his dissent, without rigorous economics, non-economic considerations, intuition, and policy preferences may guide enforcement. That will hardly benefit consumers. Economics fundamental lesson is humility, how little we know about the future, indeed how little we understand about markets at the present. Economics is a powerful tool for understanding that, but it isn't perfect.

But increasingly, major policy decisions increasingly rest on theoretical ideas or non-economic evidence about what companies intended to do, not actual effects, or the economics is missing entirely.

Perhaps Nielsen is in outlier. In its Sherman and Clayton Act cases, the FTC and the staff usually do apply economic reasoning and are appropriately humble. Interestingly, of course, those cases often come or almost always come before courts. Not so in pure Section Five cases.

The term ``unfair methods of competition'' is, as Commissioner Wright has put it, as broad or as narrow as the majority of the commissioners believes it is. The commission has issued no limiting principles unlike its two policy statements on consumer protection. There is broad agreement that such guidelines would be helpful, an overwhelming agreement that the UMC, the Unfair Methods Competition, should be limited at minimum to cases where there is consumer harm.

The chairman even seems to agree, and yet with two proposals from sitting commissioners, the chairman continues to resist. Her argument boil down to maximizing the FTC's discretion. The problem is excess discretion is the problem at the FTC. The FTC has pushed the boundaries of the law through consent agreements with essentially no judicial

oversight. And the problem is most acute in consumer protection.

First let me say that in consumer protection cases, the large majority of them are uncontroversial and require no methodological overall. Deception cases like fraud or placing unauthorized charges are bills are usually straightforward, but the FTC is increasingly dealing with more difficult cases and increasingly it is using its unfairness authority and stretching its deception authority in exercises of unchecked and opaque discretion to determine when ambiguous conduct harms consumers.

The recent Apple case highlights the problem. The FTC concluded that Apple's design of its billing interface insufficiently disclosed to iTunes users when their kids, not Apple, might make charges. Apple left parents' accounts open to make more purchases for a brief window to balance convenience for all users with unauthorized charges by children.

The economic framework to decide the case correctly was built right into the statute, but still it didn't make it into the majority's decision. Section 5N says nothing is

unfair under the act if the harm it causes is outweighed by countervailing benefits to consumers or to competition. So you would expect an unfairness case against Apple to balance harms and benefits. Instead the majority treats Apple's design decisions like cramming and assumes there is no redeeming benefit through its design.

But as any user of Apple products can attest, design is everything. Apple faces real tradeoffs here about exactly how and when to notify customers that they may be charging themselves. The FTC simply dismissed the countervailing benefits that the statute clearly requires it to weigh.

The same is true of the agency's privacy and data security cases. It is not clear what is really best for consumers. Of course, stolen data can harm consumers but so can spending too much protecting against it or limiting otherwise desirable product features.

The outcome of the Apple case was possible only because it never went before a judge. It was just a settlement. The only balancing the commission had to do was to convince Apple to settle instead of litigate. That does not fulfill the commission's statutory balancing obligation. The majority

pushed the law as far as it could without Apple baulking. Apple just wanted the case to go away. Beyond a certain point, it didn't care anymore how or whether the FTC justified its decision. It is refreshing that Commissioner Wright dissented in this case. It forced the majority to at least mount a defense that was not embarrassing. But this is a much lower bar than what the court would require.

Is there any question at all that if more of these cases were coming before a court, dissents like Commissioner Wright's, could become the blueprint for a court to potentially overrule the majority. We would have better cases, better dissents, and better argued majority opinions. I would stop there. Thank you very much.

[The prepared statement of Mr. Manne follows:]

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Mr. {Terry.} Thank you very much. Mr. Yoo, you are recognized for your 5 minutes.

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^STATEMENT OF CHRISTOPHER YOO

} Mr. {Yoo.} I am grateful the opportunity to testify at this hearing, exploring the new challenges confronting the Federal Trade Commission as it enters its second century. The FTC now operates in a context that bears little resemblance to the world that existed when it was first created. I would like to focus my remarks on two of the most significant changes: globalization and the growing importance of technology.

Focusing first on globalization. When Congress created the FTC in 1914, the vast majority of the economy consisted of local markets. Goods traveled only a short distance and rarely crossed state lines. Since that time, commerce has become increasingly national and international in focus. U.S. companies routinely operate in a wide range of countries, and business practices that once affected only domestic economies now have ramifications that are felt around the globe. The increasing globalization of the economy places new demands on agencies charged with enforcing

anti-trust laws and consumer protection. Not only must they investigate conduct that spans multiple jurisdictions, the fact that multiple regulatory authorities have jurisdiction over the same matter can force companies to incur duplicative compliance costs to the extent that the substantive is different. Companies faced with inconsistent mandates may be forced to reduce their practices to the least common denominator or forsake doing business in a country altogether.

As a result, regulatory and harmonization has now emerged as a key element of trade policy. Towards these ends, the FTC has developed increasingly close relationships with other competition authorities both through bilateral cooperation and through a global organization of competition policy authorities known as the International Competition Network. Such efforts help coordinate and standardize the work in competition authorities and will continue to grow in importance in the future.

The other big change is the increasingly sensible role that technology plays in the modern economy. Innovation has emerged as a key driver of economic growth. Products and

services have become increasingly sophisticated in their own right and have become part of a larger and more tightly integrated economic system. Technological change can also be very disruptive, altering old patterns of doing business and creating new business models and market-leading companies in the process.

Companies who find themselves disadvantaged by technological change may be tempted to look to the government for relief. The growing importance of technology will require the FTC to expand its institutional capabilities. One key step in that direction has been the creation of the office of chief technologist. This position is only four years old, and the agency is still exploring how it can best contribute to the FTC's mission.

In addition, the FTC's usual practice is to require that every major decision be accompanied by an analysis by the Bureau of Economics. The agency has not always adhered to this practice in recent years and would be well advised to make sure to follow this important procedural guideline in the future in every major case.

The FTC will also have to determine what substantive

legal principles it will apply to high tech industries. The problem is that our current understanding of innovation remains nascent and largely unsettled. This creates the risk that enforcement authorities will apply anti-trust law without a clear goal or with a multitude of goals in mind. And the past has taught us that unless anti-trust laws are applied with a clear focus on consumer welfare, they may be abused to protect specific competitors instead of consumers. Under these circumstances, the FTC must adhere to the principles that have emerged to guide its conduct since its founding in 1914. These principles require that all decisions be based on a solid empirical foundation, not speculation, and must protect consumers not competitors. In particular, the agency should make sure that it does not embroil itself in routine disagreements over price that are everyday occurrences in any market-based economy.

Indeed, both the Supreme Court and enforcement authorities have long recognized that anti-trust agencies are institutionally ill-suited to overseeing prices to make sure they remain reasonable. Consider for example the FTC's growing interest in standard essential patents. The debate

presumes that patents are being asserted in ways that harm consumers without a clear understanding of how government intervention could also harm consumers by discouraging innovation.

Moreover the typical remedy mandates uniform rates despite the fact that economic theory shows that innovation is best promoted when innovators are allowed flexibility in the business models they pursue. Instead of directly overseeing the outcomes of negotiations, the FTC already has ample authority to preserve the integrity of standard-setting processes that are being abused in ways that harm consumers.

Finally, some are calling for the FTC to exercise the authority granted by Section Five of the FTC Act to police unfair methods of competition in ways that go beyond consumer welfare. The past has taught us that attempting to use the anti-trust laws to promote goals other than consumer welfare opens the door to a wide range of intrusive government intervention that often harm consumers.

In short, the lesson of the past 100 years is that the FTC would be well served to continue to look to consumer welfare as its guide. Any other approach opens the door to

governmental overreach and to allowing the law to be abused to benefit individual competitors instead of consumers.

[The prepared statement Mr. Yoo follows:]

********** INSERT 4 **********

Mr. {Terry.} Thank you very much. Mr. Lande, you are now recognized for 5 minutes.

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^STATEMENT OF ROBERT LANDE

} Mr. {Lande.} Chairman Terry, Ranking Member Schakowsky, and members of the subcommittee--

Mr. {Terry.} Is your microphone on?

Mr. {Lande.} No.

Mr. {Terry.} And why don't you pull it a little closer too? Yeah, perfect.

Mr. {Lande.} Sorry about that. Chairman Terry, Ranking Member Schakowsky, and members of the subcommittee, I am truly honored to appear here today. The subject of my remarks will be the overall scope of Section Five of the FTC Act. I will discuss how Congress intended this law to be interpreted in a broad and flexible way. I will also discuss why any Section Five anti-trust guidelines should center around the goal of protecting consumer choice rather than increasing economic efficiency.

As all the commissioners agree, Congress intended the FTC Act to include more than just Sherman Act violations. The legislative history makes it clear Section Five was also

intended to prohibit incipient violations of the Sherman Act and conduct violating the policies behind the Sherman Act. The Supreme Court has accepted this interpretation.

There are a number of specific ways the commission could carry out this congressional mandate that would be in the public interest. I will briefly discuss one example, and there are others in my written testimony.

Tying exclusive dealing violations that violate the Sherman Act require a minimum amount of market power. I believe the market power requirements should be relaxed whenever the case involves a defendant with a significantly larger market share than that of its victims. In these incipient tying or exclusive dealing situations, incumbents may be able to significantly disadvantage smaller competitors and potential entrants because of their relatively larger market power.

Suppose, for example, a company wants to introduce a new brand of super premium ice cream. Suppose an existing seller of super premium ice cream has 30 percent of this market and also 30 percent of the other types of ice cream markets. Suppose the incumbent firm tells stores that they have to

choose between the established firm's products and the newcomer's products. Suppose the store agrees to exclude the newcomer's products. These facts would be very unlikely to constitute a Sherman Act violation. However if the incumbent's exclusionary strategy succeeds, consumer choice in terms of varieties of ice cream on the market could decrease substantially, and consumer prices could increase substantially. If so, this conduct should violate Section Five as an incipient exclusive dealing or tying arrangement.

Now, last year Commissioner Wright proposed that the commission adopt Section Five anti-trust guidelines. Unfortunately this proposal contains a fatal flaw. It directly contradicts congressional intent. This is because Section Five prohibits unfair methods of competition, a prohibition that, as I noted earlier, Congress intended to be quite broad. The proposed guidelines, however, would effectively eliminate the term ``unfair method of competition'' and substitute for it a very different narrow term ``inefficient methods of competition.''

Contrary to what Congress intended, these guidelines would reach less anti-competitive conduct than the Sherman

Act. Its proposed test of illegality is whether a practice ``generates harm to competition as understood by the traditional anti-trust laws and generates no cognizable efficiencies.'' Now, this test is contrary to current law and narrower than current law.

The prevailing test balances of practices efficiency and market power effects under a rule of reason. The current law does not immunize conduct at least to a significant amount of monopoly power simple because it results in cognizable efficiency. Thus the proposed guideline would not apply to conduct that currently violates the Sherman Act, the opposite of the expansive law that Congress intended.

Now, Commissioner Wright certainly is correct that it would be desirable if the FTC issues Section Five anti-trust guidelines. However bad guidelines would be worse than no guidelines. By analogy, years ago, the United States wanted to negotiate arms control agreements with the Soviet Union. A good arms control agreement would have had many benefits. However, an agreement that would have forced us unilaterally to disarm would have been much worse than no agreement at all.

Similarly the suggested guidelines effectively would disarm the Federal Trade Commission. Now, the commission instead should formulate sound Section Five guidelines that properly reflect congressional intent. Now, I believe this can be accomplished if the guidelines were written to protect consumer choice, not economic efficiency. My written testimony explains how anti-trust guidelines built in terms of the consumer choice framework would be both faithful to congressional intent and would enhance predictability for business. I welcome your questions.

[The prepared statement of Mr. Lande follows:]

********** INSERT 5 **********

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Mr. {Terry.} Thank you, and, Mr. Ohm, you are now recognized for your 5 minutes.

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^STATEMENT OF PAUL OHM

} Mr. {Ohm.} Thank you, Chairman Terry, Ranking Member Schakowsky, and members of the subcommittee. I am here to talk today about consumer protection and in particular online privacy and data security. My comments reflect not only my scholarship but also the 10 months I spent as senior policy advisor in the office of policy planning at the Federal Trade Commission from 2012 to 2013.

I have three broad points I would like to make in my short amount of time. Number one, we should understand that there is a tendency within debates about the FTC to focus on a hypothetical FTC, one that does not reflect the FTC as it actually exists and operates. The FTC that really exists is one that is informed, and recent scholarship really exposes this, through a theory known as privacy on the ground as opposed to privacy on the books.

The idea is privacy is a very complex, nuanced, textured, contextual thing. We shouldn't want an agency that once and for all declares the rules of the game. Instead we

should want something that is more tenable to technological innovation and dynamism. And that is exactly what we have through this structure set up by Congress and the way it has been executed by the FTC.

An important component of this is documented in the scholarship as a large cadre of privacy professionals, lawyers here in D.C. and around the country, who read the FTC's pronouncements as a kind of common law of privacy law. This belies the notion that this is this opaque, progressive, envelope-pushing agency that never reveals the rules of the road for privacy. Quite the contrary, the privacy rules are something that are studied, understood, and companies are made to order their activities accordingly.

Number two, and I am sorry to use a very technical, legal scholarship term, if it ain't broke, don't fix it. The Federal Trade Commission, I left my year very, very impressed by the efficiency and the way that this agency executes its privacy mission. And I would urge Congress to help the commission maintain the status quo, the tools and the resources it needs to do the job well. By I can't resist giving you a few recommendations for small fixes that you

could make to Section Five and other parts of the FTC authorization to help them do their job better.

Number one, as I am sure you are all aware, there is ongoing litigation against Windom in data security, and as I say in my written testimony, there isn't a defender of Windom out there that tries to defend the reasonableness of the data security practices in that case. Quite the contrary, there are some very, very creative jurisdictional arguments, to my mind, far too creative jurisdictional arguments, that I certainly hope the federal courts will decline.

But in the meantime, all of this activity and all of this aggressive defense, which of course is the defendant's right, has cast something of a cloud over the FTC's ongoing ability to bring data security cases under Section Five. And I don't think I need to tell the members of the subcommittee, this is a very bad time to be taking away one of the few tools we have to incentivize good data security. I think every American citizen was impacted by some of the data breaches that occurred over the holidays.

Companies are not living up to the standards and expectations we have of them in securing our personal and

sensitive data. And they are not living up to these expectations even though the FTC is on the beat. How much worse will it be if the FTC's jurisdiction over data security is called into question? And I would ask Congress to clarify what is already in the statute, that data security falls within Section Five.

And last but not least, number three, I would argue that the definition of harm as it is currently defined in the word unfairness in Section Five, could use a refresh. It was last defined by the FTC in 1980. Congress memorialized this understanding in the statute in 1994. And at that time, two statements were made about harm that I think do not reflect the way the Internet has changed the nature of privacy harm.

Number one, the statement says--and it is laudable that the statement is still so relevant 23 years later. It says harm is almost always monetary, and yet we have case after case demonstrating non-monetary yet significant harms from privacy violations on the Internet. I would be happy to elaborate during questions. And two, the statement says that harm under unfairness in Section Five is rarely merely emotional, injurious primarily to emotional standards.

Again we have seen in many cases, for example, the FTC's case is designer ware that harms to emotion may be quite concrete, quite substantial, and the kind of thing that an effective law enforcement agency like the FTC should have the jurisdiction to bring cases against. Thank you very much for having me.

[The prepared statement of Mr. Ohm follows:]

********** INSERT 6 **********

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Mr. {Terry.} Thank you. All well done. Thank you very much. Very informative. Now it is our opportunity on this panel to ask you questions, and I think one of the areas of great discussion amongst those of us here who have never been on the inside of the FTC but we look at the unfairness issue and whether it appears so nebulous to us that it can morph into anything you want it to be, and that seems to be what is occurring now.

So I want to ask each and every one of you what is your--and I know this is an unfair question in the sense that you get about a minute to answer it. But what is your view? Is the FTC expanding the use of the term unfairness? Are they changing it? What--do you have any specific recommendations to us on a way to make it more consistent? Mr. Beales, we will start with you.

Mr. {Beales.} I think that the definition that Congress wrote into the law is a good one. It focuses on essentially a cost/benefit test. And the issue is how good a job does the commission do in conducting that kind of cost/benefit analysis that is what the statute requires. But that is a

conduct issue. That is how do you go about using the standard as opposed to what is the standard.

I think there is no question that the FTC has expanded its use of unfairness. There was a long period where-- shortly after the unfairness policy statement, where the commission was extremely reluctant to use unfairness for anything, but I think it is a useful legal theory. It is one that in many cases focuses much more clearly on the right questions, and I think probably data security is one of those where the issue is really what are the costs, what are the benefits.

Mr. {Crane.} So, Chairman Terry, you are quite right that the word unfair is quite nebulous and open-ended, and the question is unfair as to whom. And I would suggest that the right answer to that question is unfair as to consumers. And as Professor Yoo suggested, one of the problems is that unfairness could be turned into a protection for less efficient competitors who simply cannot keep up because they are not as efficient. So I would suggest that any guidelines that the commission would issue on the meaning of Section Five would make clear that a minimum requirement for

enforcement of Section Five would be unfairness to the welfare of consumers.

Mr. {Terry.} Thank you. Mr. Manne.

Mr. {Manne.} I think the statutory language is good, as I suggested. And I think the balancing test that it contemplates is appropriate. The problem, as I think Howard suggested, is in its application. And there is at least two problems here. One is we don't actually know for sure what the FTC is doing because the vast majority if not the entirety with two minor exceptions frankly of the cases that they have--where they have interpreted Section Five, in particular in privacy and data security cases, arise in dissent decrees with very little analysis by the commission.

To call this common law is a little bit crazy. There is no way you could discern clear principles, and let alone clear principles that might have evolved over time from what the commission gives us in its dissent decrees. So if they are actually applying the statute correctly, we don't know.

But I think there is evidence, as the Apple case suggests, that they are not applying it correctly anyway. They seem to have somewhat abandoned or at least truncated

collapsed into a reasonableness test the entirety of the language in the statute. And that may indeed in the background be analogous to what the statute requires, but I am skeptical.

There is very little clear application of the specific facts of any specific case to--or sorry, the language of the statute to the specific facts of each specific case. The dissent decrees look the same. The remedies are the same, and that can't be right. It can't be that every company that is addressed by the FTC, no how big they are or what the problems are, deserves exactly the same remedy and exactly the same 20-year dissent decree.

Mr. {Terry.} Right, Mr. Yoo.

Mr. {Yoo.} We actually have a lot of studies of other agencies who have applied similarly nebulous mandates, and what they find is that even an attempt to distill common law principles from them have revealed that the agency behaves in an extremely unpredictable way, particularly under mandates such as public interest mandates and unfairness mandates. Attempts to distill from them a consistent point of view has failed.

And what is interesting is when you have multi-factor balancing tests where you are doing multiple things, the agency can justify almost any decision it wants to make. Now, the FTC actually historically solved this by focusing on consumer welfare. By disciplining itself under the influence of the courts to actually focus in a clear sort of way.

The problem is we don't always know what exactly benefits consumers. I will give you a couple easy examples. We are often suspicious of privacy and Internet companies who take personal information. There is research by Catherine Tarkenton at MIT that suggests that the ability to target ads allows Internet companies to generate 65 percent more revenue. So the reality is you are giving up a certain amount of privacy, but because the companies get more revenue, they are able to provide services that actually may be creating benefits that have to be taken into account at any balance.

And what you will discover is you will see fights right now in different spaces about patents about who should be paying how much. The result is there is we are seeing that in fact consumers benefit tremendously by devices versus

services, and that in fact there is an allocation that is very ambiguous about how those go.

The last point I would like to make is to reinforce a point that Geoff Manne made about use and consent decrees. Technically those aren't law, and even worse they are often done by the FTC in merger contexts where the issue is not the particular privacy or competitive practices at hand, but do you want the merger and are you willing to give up other things for it. And the agency can use its authority, the fact that they have the merging parties at a--over a barrel to make them address issues that aren't actually germane to the merger.

Mr. {Terry.} That is a concern. Mr. Lande?

Mr. {Lande.} I agree with Professor Crane that the unfairness jurisdiction should not be used to protect competitors. I certainly agree it should protect consumer welfare. The problem is that is an ambiguous term. People define that differently. Many people define that to me nothing more than economic efficiency, whereas I think consumer welfare should mean consumer choice, that is worrying about the choices, the significant choices on the

market.

That would actually have three components. In addition to an efficiency component, it would have a concern with any wealth transferred from consumers to firms with market power or transferred from purchasers to a fraudulent firm, and it would also have a tremendous concern with non-price competition as Professor Ohm talked about earlier.

Mr. {Ohm.} So the answer is yes, I think the FTC is using its unfairness capabilities and authorizations in slightly different ways. But I think that is not because the FTC is pushing the boundaries on what it does. I think it is a testament to the changing nature of harm on the Internet. And so with all of the wonderful innovations that the Internet brings, it gives those innovations to people who would do harmful things. You know, the news headlines are replete with examples of this. As you all know, a few months ago, a father received in the mail a flier addressed to daughter killed in car crash, right.

These are things that were not possible before the rise of the data collection, the big data techniques that are now present, and we should expect that as harm begins to

proliferate, expand, and change the nature, that authorization such as unfairness which after all reside on theories of harm would expand as well.

Mr. {Terry.} All right, thank you very much. Mr. McNerney, you are recognized for--Ms. Schakowsky is recognized for 5 minutes.

Ms. {Schakowsky.} Thank you, Mr. Chairman. I wanted to ask Mr.--Professor Ohm a couple of questions first. Currently the FTC brings legal actions against companies that fail to employ reasonable data security under Section Five, Unfair and Deceptive Practice Authority. However, there is no comprehensive federal law governing the collection or protection of consumer information. So in your testimony, you recommended that Congress consider making explicit the FTC's data security enforcement authority which you state is ``already clearly within the broad strictures of Section Five.'' So could you explain that recommendation about clarifying--

Mr. {Ohm.} Again this a commentary on the cloud that has been cast by litigation like Windom and Labbe MD where the FTC has to devote some of its scarce resources to

defending theories that frankly I find a little too creative. And the federal courts, as is, you know, their right, is taking a very, very careful look at this. Congress could help us have a clearer data security mandate by just clarifying--

Ms. {Schakowsky.} So maybe we could talk to you more clearly about what language might be--

Mr. {Ohm.} Yeah, I would appreciate it.

Ms. {Schakowsky.} Okay, in order to implement the Children's Online Privacy Protection Act, Congress explicitly granted the FTC authority to promulgate regulations using the Administrative Procedures Act. Outside of such authority specifically granted by statute in this case, the FTC's authority to promulgate rules regarding privacy and data security is severely limited by the--what I believe to be the unduly burdensome Magnus and Moss rule-making procedure.

So, Professor Ohm, are there tools that the FTC currently does not have that would improve its data security enforcement or deterrent capabilities such as APA rule making authority, enhanceable penalties authority, or jurisdiction over nonprofit entities like universities and hospital?

Mr. {Ohm.} Absolutely. I want to be clear. I think that in data security in particular, we are better off with an evolving standard like we have right now. I don't think any of us should want the FTC to spend a lot of time promulgating data security rules that will no longer be accurate the day that they are enacted. It is such a rapidly moving target.

But on the other hand, enhanced APA authorities absolutely would be greatly appreciated and bring a lot more certainly to all as well as a higher ability to bring civil penalties. Clearly the deterrent effect message is not getting across to some companies. Providing the FTC with a larger stick in some of these cases would be a good idea.

Ms. {Schakowsky.} And it seems to me and then having to do it case-by-case like congressional authority, I think, is really cumbersome.

Mr. {Ohm.} Absolutely yes. A broader set of authorities would be very useful for the mission of the FTC.

Ms. {Schakowsky.} And finally would a federal breach notification law that gives FTC explicit authority to bring actions against companies for failing to timely notify

consumers and law enforcement officials of a breach improve the FTC's ability to protect consumers? And what do you believe would be the utility of such a measure alone compared to a comprehensive bill that also included baseline data security standards?

Mr. {Ohm.} I mean I think we need both. We should celebrate the laboratory of federalism that created the breach notification in the beginning. But now with 48 conflicting standards, it is probably time to federalize and pre-empt those laws and have one uniform standard with the FTC playing a role. Baseline data privacy legislation is an excellent idea, and I think the White House's White Paper that laid out some of the principles, I might go into that, is a great place to start.

Ms. {Schakowsky.} Thank you. And I missed the answers to all the questions. I think I left. Mr. Lande, the question about the anti-competitive conduct and Section Five, I wonder if you could maybe repeat or expand on what you said while I wasn't here.

Mr. {Lande.} Sure. The question was what is unfairness authority, what I think unfairness authority is. And I

started by agreeing with Professor Crane that it is not to protect competitors. We are all in favor of consumer welfare. The problem is we often disagree about what consumer welfare is, and many people by--when they say they want to help consumer welfare, all they mean is they want to enhance economic efficiency, which often has very little to do with the welfare of real consumers, at least in the short run.

For me, I believe that unfairness really translates to the consumer choice framework. That is ensuring that the choices that consumers want are, in fact, on the marketplace, and nothing artificial is done to remove those choices from the marketplace. And if you unbundle that, it really has three components. First, a concern with economic efficiency, second, a concern with wealth that might be transferred from consumers to firms with market power or from consumers to firms engaging in fraud, a concern with that transfer or distributive effect, and then finally a heightened concern with non-price competition which Professor Ohm had talked about earlier.

Ms. {Schakowsky.} And I yield back.

Mr. {Terry.} Thank you. You may have heard the bells go off or buzzer or--and we have time, I think to get through everybody. But if we don't, don't worry. We are going to adjourn, not recess. So, Mrs. Blackburn, you are recognized for 5 minutes.

Mrs. {Blackburn.} Thank you, Mr. Chairman, and what I am going to do is submit most of my questions to you. But I am going to condense this a little bit. As you have heard from the Chairman and from Ms. Schakowsky, we are all involved and concerned about privacy and data security. And we have had the working group. We have put a good bit of attention into this. As we look at privacy legislation and data security legislation, Mr. Beales, I am going to start with you and go down the line. Number one, these are the questions I want you all to answer for me. Is it appropriate that the FTC retain privacy jurisdiction? Because we have the what takes place in the physical world and the online world. Number two, are they effective in their approach? Number three, should more of their attention be placed on enforcement and education and less on regulation? And the fourth piece I want to come from you all is what would you

like to see in a light-touch data security and privacy bill? Mr. Beales.

Mr. {Beales.} Well, to try to address your specific questions, I think it is appropriate that the FTC retains privacy jurisdiction. I think they have been mostly effective in that area. They have been more effective when they have been focused on things that really are harms. It was the consequences-based approach that led, for example, to the do not call list that I think was a very successful answer, intervention to address something that really was a privacy problem and not an isolate example or a speculative case.

I think there should be--it should be enforcement based, not rule based. That is a more sensible way to respond to the wide variety and rapidly changing circumstances that we see in the privacy environment. I am not sure beyond data security, and I think the notion of civil penalties for data security breaches or inadequate security procedures is one that has merit. Beyond that, I am not convinced that a privacy law would make things better, and there would be considerable risk of chilling really useful, innovative ideas

that nobody has even thought of yet.

I think when we--in the last 15 years--15 years ago when Congress started talking about this, no one would have imagined that billions of people want to post the details of their personal life for everybody to see. But that is what Facebook is.

Mrs. {Blackburn.} Okay.

Mr. {Beales.} And it has created huge value. If we tried to regulate at the beginning, we may well have precluded it by mistake.

Mrs. {Blackburn.} Thank you. Mr. Crane?

Mr. {Crane.} So my expertise is on the competition side, so I think I should defer to other members of the panel.

Mrs. {Blackburn.} Sounds good. Mr. Manne?

Mr. {Manne.} I will use his time. So I think the core problem here is, as I have been suggesting, when it comes to things like privacy, when it comes to data security, contrary to what Paul said, you know, maximum privacy or maximum data security are not optimal for anyone. These are things, unlike say low prices, that have both costs and benefits.

And what is really crucial is getting the appropriate balance, is understanding how not to deter valuable things while yet still deterring harmful abuses of information.

And I don't think that the FTC is doing a very good of this yet, or if they are, they are not telling us how they are getting there. And it is essential that we know so companies can know how to respond, how to anticipate what may or may not be a problem and so that Congress and the courts can ensure that the FTC is doing its job.

I am wary of more enforcement particularly in the privacy realm where honestly no one has really demonstrated that there is a significant problem. You know, data security is something else, right. Breaches where information is stolen, I get it. Recently while the FTC was holding a hearing on privacy issues and the Internet of things doesn't even exist yet, right. It is not even really a problem. $27 million of bitcoin is being stolen because of a data breach.

Mrs. {Blackburn.} My time has expired.

Mr. {Terry.} So we will just assume that will be a question submitted to the three left. Mr. McNerney, you are recognized for your 5 minutes. Mr. Bilirakis, do you have

questions? You will be after Mr. McNerney.

Mr. {McNerney.} Thank you, Mr. Chairman. Mr. Ohm, I would like to know if you think it is possible to develop security, data security standards either in the FTC or through the private standards development process that would be applicable to sectors of the industry or uniformly throughout the industry.

Mr. {Ohm.} I am skeptical that you can have any meaningfully detailed data security standard that applies to all industries. However, if you tackle this on a sector-by-sector basis, I think you absolutely could. I think the key is that you need to focus on true compliance. You need to focus on things like industry standards and reasonableness as opposed to a kind of check-the-box mentality. But I have also witnessed how efforts of Congress to bring about cyber-security legislation have not gone so well. I absolutely think that trying to find some sort of forcing mechanism to bring companies together to talk about data security standards is a wonderful idea.

Mr. {McNerney.} Thank you. Mr. Yoo, you stressed that the FTC should ensure it focuses on protecting consumers at

all times. Do you think the agency has the safeguards in place to ensure that consumer protection comes first?

Mr. {Yoo.} They have the safeguards in place should they choose to use them, and the important is things that--the agency has developed over the last century a lot of internal processes and substantive guidelines that makes sure that they place consumers at the forefront.

But there are--I would put a couple cautionary notes. So there is a tendency, for example, in data security. People are talking about comprehensive legislation. That tends to lead to inflexible rules, and so you see there is a tension in what people are saying or the flexibility that people need at the same time, but the need for umbrella legislation--

Mr. {McNerney.} So the flexibility should be with the commission?

Mr. {Yoo.} Well, to an extent, but the problem that they should have is what I would say is two things. One is if you end up with that world, you have what we have in Europe which is inflexible rules and no enforcement action whatsoever, which is sort of the worst of all possible

worlds.

The model that I would think is what the FTC did with privacy policies is they brought people together and instead of issuing rules, they allowed industries to get into a discussion and actually formulate new policies, which I think were much more beneficial.

Another problem with it, if you just go about it through enforcement, there is a hindsight problem, which if there is always more you can do. But after a problem has happened, you will say well of course you didn't do enough. And in fact, the decisions--companies have to make the decisions before hand, not afterwards. And so I think by bringing companies together to talk about best practices, creating a forum, will be a much more effective than even through enforcement action.

Mr. {McNerney.} Thank you. I have other questions, but I think I am going to yield so that Mr. Bilirakis can--

Mr. {Terry.} All right, thank you since there are two minutes left in the vote. Mr. Bilirakis.

Mr. {Bilirakis.} Thank you so very much. I appreciate it, and I will go as quick as I possibly can. And I will

submit the other questions as well, but I have a couple here. The FTC--and this is for the panel. The FTC has a responsibility to help provide consumer protections by ensuring that up-to-date information regarding scams and complaints are available to consumers.

However the GAO has identified a number of instances in which states felt frustrated with a lack of support from federal officials in helping to combat fraud against the senior populations. And the question is do you believe the FTC currently has the ability to help facilitate this effort? Can you discuss what impediments prevent greater support from federal officials to increase cooperation with state authorities in order to protect seniors from scams and abuses? And how can the FTC help better protect seniors within its current budget? And for the panel, whoever would like to start.

Mr. {Ohm.} I am happy to chime in. I don't know the details, I apologize, of the GAO report specifically, but I do know from my time at the FTC that focus on both state cooperation and vulnerable populations including senior populations are at the highest levels of priority per the

current chairwoman, her predecessor, the chairman. I have no doubt that they will work within their resources to do exactly what you are talking about and to enhance exactly what you are talking about. More resources, of course, would probably be appreciated in this vein as well.

Mr. {Yoo.} The problem is related to the globalization problem I talked about before. State authorities have trouble reaching conduct that spans multiple states. They face enterprises that have much broader horizons, and that in fact they are in a very difficult position. The FTC is absolutely, just as they are cooperating with other authorities, can bring people together in ways I think are extremely constructive.

The interesting thing, there is an ambivalence about federal involvement personified by the do not call initiative. That was initiated by state PUCs. It was the best headline states PUCs had seen in decades, and then they federalized it. And they were in fact, state, it is a very delicate relationship you have that state authorities want help in an era of declining state revenue. That is very, very important.

On the other hand, they want to make sure that the federal doesn't actually displace the enforcement authority of the states. Otherwise, the political benefit doesn't go to them. And so there is a very strange dance organizations like the FTC have to play.

Mr. {Beales.} I think the FTC has--I mean certainly in the time that I was there, there was a very structured attempt to share complaint information in particular with state enforcement authorities. There is-the commission's complaint database is accessible to other law enforcement agencies who can join and get the same access that the commission staff has to those complaints essentially. And I am also not familiar with the GAO report as to, you know, as to what the particular issue, but whether they are complaints about problems for the elderly or anybody else, I mean there is or was a complaint sharing mechanism that worked quite well and led to a great deal of cooperation.

Mr. {Yoo.} I would just say quickly as I was starting to answer Mrs. Blackburn's question, resource allocation is important and something that I think, you know, Congress and everyone else should be looking at, ensuring that indeed the

FTC is putting its resources where the low-hanging fruit is, where there are obvious problems.

I don't know for sure--again I am not familiar with the GAO report, I don't know that this is one of them. But if it is, then I would like to see more resources there instead of things like, as I was suggesting, you know, an Internet of things, workshop to discuss potential possible privacy harms that aren't really--haven't really materialized and may not ever. You are talking about very concrete sort of harms, and that is where they should be directing their attention.

Mr. {Bilirakis.} Thank you very much, Mr. Chairman, and I would like to follow up with you specifically on the GAO report and give you some specific examples. Appreciate it very much. I yield back, Mr. Chairman.

Mr. {Terry.} Thank you, and I want to thank all of our witnesses for participating today. We anticipated at least a good, solid two hours, but sometimes on Fridays, things speed up for some reason. I just don't get it, and today was one of those days. But I think we did a good job of getting your insights on the record, and it is really appreciated. As mentioned, we have the opportunity to submit questions,

written questions to you. We usually leave that open for a couple of weeks for our staff to be able to help us with that and submit those. And we give you a couple of weeks to reply. Would really appreciate it. Again thank you for your time and your testimony, and we are adjourned.

[Whereupon, at 10:47 a.m., the Subcommittee was adjourned.]